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IN THE

Supreme Court of the United States

October Term, 1942

VIRGINIA ELECTRIC AND POWER COMPANY
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to
The United States Circuit Court of Appeals
For the Fourth Circuit

REPLY BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

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REPLY BRIEF FOR VIRGINIA ELECTRIC AND POWER COMPANY

I.
INTRODUCTION

The brief for the Board does not attempt any direct reply to the Company's analysis of the relation between the reimbursement order here in issue and the effectuation of the policies of the Act. Nor does the Board even attempt any answer to the views expressed by the five Circuit Courts of Appeal which have in about twice that number of cases held dues reimbursement to be beyond the power of the Board (Petitioner's main brief p. 14 and Appendix B thereto). Rather than by any precise consideration of the causative setting for the closed shop and check-off or of the consequences of the remedy sought to be imposed, counsel for the Board have thought it expedient to support their case by enlarging their complaints against the Company's past conduct.

Those claims are in many instances enlarged beyond the findings of the Board on the authority of counsel alone contrary to the clear preponderance of evidence. Some word of correction as to the factual background will therefore be needed at the outset, in order to reestablish the history with some measure of its real proportions. That will be considered in Part II below.

Petitioner's main brief is believed to anticipate and answer most of the positions taken by the Board and there is no need, since the Board attempts no direct reply to its successive positions, to go through them here *seriatim*.

The Board's discussion seems to rest on two pivotal misconceptions: For one, the Board takes the view that if an employer has offended any of the policies of the Act in any

particular, he may be charged with responsibility for anything that may be done thereafter by any one else, even though the employer was powerless to prevent the act in question; specifically that an employer, if guilty of disclosing a preference among organizations so that the men "were not as free as the statute requires" (S. R. 36), he thereby becomes responsible for all dues that the employees may thereafter fix and require to be paid, and is liable for their repayment, whether payment was made willingly by the men or not and whether the results were beneficial to them or otherwise. The untenability of that view under any doctrine of causation and under any reasonable concept of responsibility under the Act is examined in II, 1 below.

The other pivotal misconception of the Board is the view, ably argued, that the repayment of checked-off dues is analogous to reimbursement of back pay. The errors of that assumption will be examined in II, 2 below.

No further argument is believed necessary on the point that the Board's findings of domination, if review of them be necessary, are unsupported. A comparison of its 1942 decision with its 1940 decision, in the light of the brief travel-guide provided in petitioner's main brief (pp. 4-10), shows that the main basis of the Board's decision is still the bulletin of April 26, 1937 and the speech of May 24, 1937, which this Court has held not in themselves to support an adverse finding. It seems apparent that the other incidents relied on by the Board were incapable of exerting any general influence on the men or of altering the plain meaning of those two executive messages (see petitioner's main brief at pp. 36-37)*.

*The Board does not seem justified in saying (Board's brief, p. 22) that the court below passed on the facts independently, for the court's opinion shows that it felt constrained to the result it reached by what it believed to be a "clear intimation of the Supreme Court as to the sufficiency of the evidence to sustain a finding of domination" (S. R. 70).

II.
THE FACTS

1. The Board's Brief Overstates the Facts

The Company respectfully believes that the Board's findings and conclusions are not supported by evidence and are not permissible in law and therefore should be disregarded. But assuming, for this phase of the argument, that the Board's findings were permissibly made, surely it should be a sufficient statement in behalf of the Board to summarize what its findings actually were. This was not done.

Thus the Board's brief says that in one of the employee meetings at which representatives were chosen to hear the May 24 address, the presiding supervisor appealed to the men to form an unaffiliated union (Board's brief, p. 9, n. 11*). This was not found by the Board. It was denied by the presiding supervisor (R. 554 and 556) and by two of the employees present (R. 636 and 675). Various employees are said to have understood that the May 24 address required them to form a company union (Board's brief, pp. 9-10, n. 12), but that was not found by the Board and no reference is made to other employee testimony that no such impression was derived: e. g. "the only thing he said was they were willing to cooperate with any organization" (R. 586) and "... we decided it didn't make any difference how we wanted to organize, independently or CIO or AF of L, or either way" (R. 800; and see R. 636, 704 and 721 and 722). The Board's brief says that when this address was reported by those representatives to the men at large at various meetings throughout the system, the reporting representative at one meeting said it was the Company's desire that they form a company union (Board's brief, pp. 11-12, n. 16). This was not found by the Board and is contrary to the testimony of

*The Board's brief has been seen only in page proof. The final pagination may vary.

the reporting representative (R. 676-677) and one of the leaders of the meeting (R. 590).

When the I. O. E. membership campaign got under way, we are then told that two superintendents participated in obtaining a membership card from a recalcitrant employee (Board's brief, p. 13, n. 20). This was not found by the Board. It was categorically denied (R. 537-538). One of the leaders of the I. O. E. movement is said to have made a speech claiming that the company would favor it, but would oppose other organizations (Board's brief, p. 14, n. 20). This was not found by the Board. It was denied by one of the attending employees (R. 802).

Coming then to the bargaining conference with the I. O. E., it is said that the proviso to the check-off, added at the Company's insistence, which entitled any employee to revoke his assignment of wages at any time, was admitted to be meaningless (Board's brief, p. 15, n. 21).* That was not found by the Board. The statement was made with the existing by-laws of the I. O. E. as a premise, which required payment of dues through the check-off. The provision was far from meaningless, however, for it was competent for the I. O. E. to change its by-laws by its own action at any time (R. 855) and, upon a change by it in this respect, the check-off would become individually optional.

Emphasis is laid on the instruction that A. F. of L. organizers should not solicit on Company time and property (Board's brief, p. 6, n. 8 and pp. 16-17), but the brief does not mention that identical instructions were issued to the whole supervisory staff with respect to all organizing efforts

*For convenience, the check-off clause, the closed shop clause, the by-law which made utilization of the check-off mandatory, the by-law providing the procedure for amendments and the form of application for membership in the I. O. E. (and assignment of wages attached thereto) are set out in the Appendix hereto.

(R. 289-290, 319-320).* Violations of these instructions were committed by the complaining unions** as well as by the I. O. E. The impertinent conduct of Mann, the discharge which followed from it being urged as a discrimination against affiliated unions, is urbanely referred to as a failure to use the prefix "Mister" with respect to Bishop "in discussions with other employees" (Board's brief, p. 17), thus ignoring the critical facts, though there was no dispute in regard to them. Mann had come into an office crowded with employees and demanded in a loud and angry tone "Anybody seen this guy Bishop around here?" and refused to apologize to Bishop, whom he then saw to be present, despite the fact that this was generally regarded by the men, both those present at the time and others, as a challenge to Bishop's authority.*** Even General Foreman May is said to have made a threatening remark about the A. F. of L. (Board's brief, p. 17, n. 24), though the Board did not so find and May clearly did not do so (R. 518-519).

We do not ask the Court to review these scattered incidents and determine the true facts. They are given merely as illustrations of the over-zealous presentation in the Board's brief, which can not, in consequence, be accepted as a wholly accurate summary of the factual background. The following uncontroverted points of fact will, however, at least provide some measurable frame for the picture.

2. Uncontroverted Facts

The instances of interference mainly relied on relate only to two employees (Bishops and Edwards), both of them

*The I. O. E. organizers had indeed instructed their own men to the same effect (R. 596-598, 645-646; and see R. 600-602, 683-684, 728 and 737). It is of interest that the full management reply to the A. F. of L. organizers was that they were perfectly free to do as they wished, but not to solicit on Company property or time (R. 350-351, 370-372, 428-429, 448).

**R. 155-156, 178-179, 669-671, 684, 709-710, 730-732, 793-794.

***R. 392-934, 407-410, 442-447, 811-814.

supervisors of the Company's transportation operations in Norfolk. No such instances were found by the Board in other departments or in other communities. It does not seem to be claimed that such conduct had any influence outside its immediate neighborhood, and it can not be seriously urged that it had any substantially intimidating effect on the witnesses who testified concerning it, for all but one of them freely joined, and maintained memberships in, one or more of the complaining unions (R. 235-236, 151, 164-165, 245-247, 149, 150-151, 114, 137).

No claim is made, in the Board's brief or in its findings or anywhere else, that there was at any time any intrusion by the Company into the management of the I. O. E. or that its affairs were ever conducted otherwise than by the men themselves in the independent assertion of their own wishes. Thus there has never been any attack on the opinion of the court below on the first hearing (R. 1012) that:

> ". . . it is not contended that the company . . . dominates it [the I. O. E.] in any way or in any way interferes with the control exercised over it by its members."

There is no claim that the Company was guilty of any domination, interference or support in any way after the organization of the I. O. E. except through the closed shop and check-off clauses of the trade agreement. The only claim, aside from the closed shop and check-off clauses, is that the Company, while proclaiming the freedom of the men to do as they wished, nevertheless disclosed a preference as among competing forms of organization at the time when a choice was being made.

It is further undisputed that the Company did not initiate the proposals for the closed shop or the check-off, but both of them originated with the men themselves. The Board has found that the Company agreed to the check-off only with a

proviso entitling each employee to revoke his assignment (S. R. 32) and this automatically left continuation of the check-off to such provision as the I. O. E. by-laws might from time to time contain as to the method for the payment of dues and, if so permitted by the by-laws, to the individual choice of each employee. The evidence is unarguable that the Company resisted the request for the closed shop clause with determined opposition (R. 264-265, 296-297, 314, 446, 619). Thus there has never been any attack on the opinion of the court below at the first hearing (R. 1012) that

> "Two matters were the subject of much controversy, the amount of the wage increase and the closed shop provision. Both were the subject of compromise. . . . The Company opposed the provision for the closed shop, but acceded to it on condition that membership in the association should not preclude membership in any other labor organization that the men might desire to join."

While the Company yielded in deference to the intransigent demand of the I. O. E. and as a part of a general settlement of the controverted issues, it never withdrew its opposition and sought abolition of the closed shop when negotiations for a renewal contract were begun a year later (R. 461).

Finally, it is uncontroverted that the Company on three occasions, which opened and punctuated the period of actual organization, in good English words stated that:

> "The Company recognizes the right of every employee to join any union that he may wish to join, and such membership will not affect his position with the Company" (Bulletin of April 26, 1937, R. 35).
>
> "The Company wants to make it perfectly clear that its policy is one of willingness to bargain with its employees in any manner satisfactory to the majority of

its employees and that no employee will be discriminated against because of any labor affiliations he desires to make" (Address of May 24, 1937, R. 823).

"Employees of Virginia Electric and Power Company have a right to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing, and the Company has not sought and does not seek to dominate or interfere with employees in the exercise of any of their rights, individually or collectively" (Bulletin of June 24, 1937, R. 861).

The effort of the Board's brief is to deepen the culpability of the Company so that no form of punishment may seem too grave. Unique iniquity, it urges, calls for unique remedy. But that surely is not a tenable view of the circumstances shown in this record. If any index extrinsic to the facts themselves were needed to show that if the Company was culpable in law it was so only as a borderline case, that would seem to be supplied in good measure by the fact that the Board's original order was set aside in its entirety by the court below on the first hearing, and this court did not enforce it. It is hard to imagine a much more debatable case than one that requires two decisions by each of the three tribunals before its final disposition. This is suggested indeed by the Board itself in the form of its finding that when the employees of the Company "formed the I.O.E. they were not *as free as the statute requires*" (S. R. 36; italics added).

III.
ARGUMENT

1. The Doctrine of Causation

In view of the general denunciations in the Board's brief it will be clarifying to recall just what is the wrong that the Board has found on the part of the Company.

The check-off itself, it should be remembered, while expounded in ominous though indecisive words in the Board's brief (pp. 23, 26, 27), is not intrinsically an evil thing. It is not forbidden by the Act. The very contrast between the failure of the Act to make any such prohibition and the insertion in the preceding year of such a prohibition in the Railway Labor Act*, which is mentioned in the Board's brief (pp. 23-25), emphasizes the legality of the check-off as such under the Act. Not only is it lawful as a matter of statutory construction, but it is unobjectionable as a matter of public policy. That is sufficiently shown by the habit of decision of the National War Labor Board to require a check-off in ordinary circumstances upon appropriate request; for a check-off, the National War Labor Board considers, is so reasonable and appropriate that any union is entitled to it which has not forfeited its claims by improper conduct.** Indeed the National War Labor Board

*49 Stat. 1185, Section 2, Fourth; 45 U.S.C.A., Section 152, Fourth.

**This policy was established in the "Little Steel" Case, *In the Matter of Bethlehem Steel Corporation, et als. and United Steel Workers of America, C. I. O.*, July 16, 1942, Cases No. 30, 31, 34 and 35, 10 L.R.R. 675, 680. There the War Labor Board said:

> "The check-off eliminates the picket lines for collecting dues and their attendant abuses. With a maintenance-of-membership clause, the check-off prevents the necessity for the discharge of a would-be delinquent. As pointed out in the panel report, the check-off will save the time of the union leaders for the settlement of grievances and the improvement of production. This sharing by the company and the union of their common prob-

has just required a check-off by the Company for one of the complaining unions in this case.* It is well known that a check-off, together with some form of requirement for union membership, is one of the most usual and frequent requests that unions make.

So the check-off is not, as such, unlawful under the Act nor is any special consequence attached to it. The Board has no warrant to undo either the check-off or its consequences as such. The pertinence of the check-off for present purposes is wholly as an incident to the statutory offense of dominating a union. It is, of course, one of the innumerable ways in which assistance may be given and such assistance, if sufficient to overcome the independence of the union, becomes domination. But it is only the domination that the Board is entitled to eliminate.

The closed shop clause has a similar status. It is expressly sanctioned by the Act except in the case of a dominated union (Section 8(3)). Likewise it is acceptable from the point of view of public policy: the National War Labor Board customarily requires some form of requirement for union membership, usually either a closed shop or a so-

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lems and their responsibilities for shop discipline and efficient production through the maintenance of a stable membership and the prompt collection of union dues, makes for a better and more cooperative company, and a more responsible and more cooperative union."

This decision has been regarded by the National War Labor Board as setting a uniform pattern and the provisions for a check-off required by that board since have taken a standard form; e.g., *In Re Pickands Mather Mining Company, et als.* and *United Steel Workers of America (C.I.O.)*, March 13, 1943, Cases No. 632 and 632A, 12 L. R. R. 107, 108.

**In the Matter of Virginia Electric and Power Company and The Amalgamated Association of Street, Electric Railway, and Motor Bus Employees of America, Division 1177 (Norfolk), Division 1264 (Portsmouth), and Division 1220 (Richmond), A. F. of L.*, Regional War Labor Board, Third Region, April 20, 1943, Case No. 111-629-D, not yet reported. This decision was by a panel and is subject to the action of the Board.

called maintenance-of-membership clause, which requires continuation of union membership by those who are members at the outset*. Of course there would have been no practical difference here between such a clause and the clause actually employed, for 90% of the employees were members before the trade agreement was negotiated. The National War Labor Board has just required such a clause of the Company**. In result, therefore, the closed shop as such is lawful; it is not as such proscribed; nor are any special consequences attached to it as such. The closed shop can be unlawful only as one of the ways in which assistance may be given which, if sufficient in amount, may constitute domination. As in the case of the check-off, therefore, the Board has no authority to undo the closed shop as such, but only to eliminate the domination that may result in part from it.

These comments assist in identifying the wrong found by the Board. While its ultimate conclusions are expressed, as in the case of any careful drafting, in the words of the statute, and thus do not identify the specific fault, there is no doubt when the rest of the findings and conclusions are examined. There is no finding or conclusion, nor has there ever been any evidence or claim, of any intereference, domination or support on the part of the Company except (i) active manifestation of employer preference in the period of choice ending prior to the formal organization of the I.O. E. on June 15, 1937, or at least prior to the execution of the trade agreement on August 5, 1937 and (ii) subsequent assistance to the I. O. E. by virtue only of the closed shop and check-off clauses of that agreement, they being deemed unlawful as a means of assisting a union for which a pref-

*See cases cited in the second previous footnote.

**See the case cited in the next previous footnote.

erence had been indicated by the Company. But, as pointed out in petitioner's main brief (pp. 24-33), neither the check-off nor the closed shop nor their combination is sufficient to distinguish this case from any case of a union formed by men who "were not as free as the statute requires" (S. R. 36).

This identification of the evil found by the Board marks a fundamental limit of responsibility under any familiar doctrine of causation. There is no finding or evidence or claim that the Company intruded into the management of the affairs of the I. O. E. or in any way restricted or influenced unfettered dominion on the part of its members. Had the Company done so and dictated the decisions of the I. O. E., the Board might well disregard the separate legal form through which the determination and disbursement of dues was ostensibly accomplished and hold it all a part of Company conduct, as is done in similar situations in corporate law: *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minneapolis Civic and Commerce Association*, 1918, 247 U. S. 490, 501; *Consolidated Rock Products Company* v. *DuBois*, 1941, 312 U. S. 510, 523-4. But no such case is presented here. In this case it is uncontroverted that:

1. The employees originated the proposal for, and demanded, the check-off*, and continued it in the trade agreement.

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*This demand was made by sending the Company, with a request for a bargaining conference, a draft of contract, as a specification of the demands made (Board Ex. 8, not printed, which had been prepared in a three day convention by employee representatives from all over the system, advised by their counsel. This draft of contract included the check-off as well as the closed shop (p. 2). There is nothing strange in the fact that the Company considered these demands before the bargaining conference began, as the Board's brief seems to imply (p. 15, n. 21). It would have been insane not to do so. Similarly, the form of application cards and the assignment (see Appendix hereto for forms) of wages which they bore (commented on in the Board's

2. The employees originated the proposal for, and demanded, the closed shop*, and continued it in the trade agreement. Of course without the sanction of the closed shop, the check-off was a mere matter of mechanics of transmission, like the postal system, which any one was privileged to utilize upon his individual choice.

3. The men originated and continued the by-law which alone made the check-off the mandatory method for payment of dues. That by-law could have been amended at any time by a two-thirds vote at two successive regular meetings of the governing board of the I. O. E. (R. 855).

4. The men alone controlled and determined the amount of dues that should be paid from time to time. This likewise was provided for in their by-laws (R. 855), which were subject to amendment, in this particular, as above. The consequences of this fact for any notion of causation, and the scope of responsibility by the Company, is sharply illuminated by the fact that in March, 1938, some seven months after the trade agreement was signed, the governing board of the I. O. E. amended this provision of the by-laws so as to double the amount of dues, increasing them from $3.00 a year to $6.00 a year (R. 576 and Board brief, p. 30, n. 34). These figures, multiplied by the number of employees, make a product of approximately $90,000 for the total period, while the only dues in contemplation at the time when the Board found an unfair labor practice to have been committed, multiplied by the number of employees, would have produced a product of only about $45,000. Is the Company to

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brief, p. 26), was wholly devised by the men or their counsel. There is no suggestion that the Company had any part in preparing them or knew anything about them or was in any way obligated to agree until it executed the trade agreement of August 5, 1937.

*R. 264-265, 296-297, 314, 446, 460-461, 619.

pay $45,000 more because the I.O.E. committee, in whose election it admittedly had no part*, determined, at a meeting in which there is no claim that the Company had any part, to double the amount of dues, for purposes that they alone knew and determined?

5. Finally, the men alone controlled the matter of disbursement and they alone decided whether any disbursements should be made, and if so, for what purposes.

Whatever may be done in other cases, on such a record as this the Company respectfully submits that the men alone are responsible, and not the Company in any degree, for what is complained of, namely, the determination, collection and disbursement of dues. Whether that was in fact advantageous or disadvantageous to the particular individual interests of the I. O. E. members, it was done by a majority of the men. Nothing in the Act makes any conduct by a majority of employees a legal wrong and the Company can not be punished for it. If any wrong was committed by the Company, that has now been wholly remedied by disestablishing the I. O. E. in compliance with the order of the court below. No question is made by the Board as to the sufficiency and completeness of that disestablishment (Board brief, p. 19). The order directing the Company to reimburse the men for back dues should therefore be denied effect.

2. Back Pay is not Analogous

The Board largely relies on the view (Board brief, pp. 33-36) that reimbursement of dues is analogous to reimbursement of back pay. It is believed that any seeming analogy is superficial and unsound.

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*The election was described in detail: Intervener's Ex. 39, R. 938 [introduced at R. 750]; Intervener's Ex. 41, R. 944 [Introduced at R. 751]; R. 79-80, 602-607, 648-652, 684-685, 698-699, 805, 807, 808. This evidence was not questioned.

In the case of back pay, an employee has lost his job and his wages because of discriminatory action against him by the employer for organizational reasons. It is plain that the employee has suffered a loss. It is plain that such loss and its amount were caused by the employer and were due wholly to the employer's offense against the policies of the Act. Union dues stand on a different footing. There has been no discrimination, for all employees have been treated equally. It is far from plain that any individual employee has suffered any actual loss as a consequence of the deduction, for it may well be that he has profited many times over by the advantages gained. If any loss was sustained, it is clear, in cases like that here presented, that neither such loss nor its amount was caused by the employer, but solely by the action of the majority of the employees in fixing, requiring the collection of and disbursing dues. To require reimbursement of such amounts is to require payment for a gravely doubtful injury that, if any occurred, was imposed by some one else. Reimbursement by the employer does not, under such conditions, fall within any concept ordinarily denoted by the term "restitution," which is the original word for this clause in the Act.*

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*The Act as originally introduced (S. 1958, see Vol. 79 Congressional Record, 2368, Feb. 21, 1935) provided in what is now Section 10 (c) that the Board should have power to enter

> "... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including restitution, as will effectuate the policies of this Act."

This was amended in the Senate Committee on Education and Labor (74th Congress, 1st Session, Senate Report No. 575, p. 15) into its present form, namely:

> "... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

So in lieu of "restitution," Congress substituted "reinstatement of employees with or without back pay," being "the most frequent form of

There is a further difference between back pay and dues which is vital from the point of view of effectuating the policies of the Act, in itself the essential criterion of Board power. Knowledge of immunity from loss of job and pay because of union sympathies or affiliations is essential to independence on the part of the employee. But knowledge on the part of an employee that dues paid to a dominated union will be reimbursed can not make him any the less willing to become a member of that union when invited, or to remain a member afterwards. By every normal expectation, if such knowledge had any motivation it would be to the opposite effect, making him more, rather than less, willing to join and remain a member. This point, stressed in petitioner's main brief (pp. 20-22), is not questioned in the Board's brief.

The only answer attempted by the Board in that regard is the assertion that such knowledge on the part of an employee would make him more willing to join an *additional* union while remaining a member of the dominated union (Board brief, pp. 37-38). But this is not a realistic view for two reasons.

In the first place, the problem to the employee is a cash problem, wholly unrelated to the accounting concepts of corporate income on an accrual basis. The possibility that there may be an ultimate refund of dues to one union could have no substantial motivation toward simultaneously paying out cash as dues to another union, especially since such repayment, quite aside from its position in time, must necessarily remain uncertain in event, for the Board has declared

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affirmative action required in cases of this type" (74th Congress, 1st Session, House Report No. 972 of the Committee on Labor, dated May 21, 1935, p. 21). If the substitute words are merely illustrative, the original word is still informative. Otherwise the substitute words, mentioning only one form of money award, would inferentially exclude any other form of money award.

that dues reimbursement is not an automatic remedy but is one to be administered by it in its discretion according to the varying facts of particular cases.*

More fundamentally, however, there is no reason, as such things go in the practical world, to pay dues to any additional union so long as the first union has an exclusive bargaining contract, for the second union could not accomplish anything. This does not mean, however, that the employee is tied to the recognized union. On the contrary, he has a remedy, appointed by the Act (Section 9(c)), specially fashioned for his need, and readily available from the Board. That remedy is a petition to the Board for an election. There is nothing in the statute or in the Board's rules of practice which requires that dues be paid to any competing union in order to procure an election; any substantial manifestation of allegiance is sufficient, such as by a signed paper authorizing a competing union to represent the signer should it be successful in obtaining majority representation. Nor does the existence of a trade agreement between the first union and the company prevent an election; if the Board finds that the first union is dominated, it disregards the contract; but even if the first union is independent, or has not been found to be dominated, the contract is not deemed a bar to an election except in so far as the Board considers that appropriate for the fullest encouragement of the procedure of collective bargaining, weighing, among other considerations in that regard, the stability of employment relations. The Board's policy in this connection is clearly stated in its latest annual report:

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*Thus it was said in the Board's 1941 brief before this Court (p. 47, n. 36) that the Board's previous practice of uniformly requiring dues reimbursement had been modified "so that the Board now considers each case individually on its own facts and circumstances and on that basis determines whether a dues reimbursement provision is, or is not, appropriate."

"The Board is frequently presented with the question whether to order an election for choice of representatives in the presence of a collective bargaining contract. The Board in such cases must weigh and resolve the conflicting interests in maintaining the stability of contractual relationships established by previous collective bargaining and in protecting the right of the majority of employees to a collective bargaining representative of their own choice.

"The Board has, however, ordered elections in the presence of such valid contracts, where the entire record indicates that to do so will encourage the practice and procedure of collective bargaining, and protect the exercise by workers of their full freedom to organize and designate collective bargaining representatives of their own choosing. Among the considerations which in particular cases have resulted in Directions of Elections are the fact that the contract was about to expire, or was terminable on notice, or that it had been in existence for more than a year. Similarly, where there was doubt of the current existence of the contracting union, or where the local union had split and the employer refused to recognize either faction, or where there was evidence of substantially complete change of affiliation of the employees concerned, the Board has ordered elections." (Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942, p. 54).

This remedy of election is thus readily available to the men and will be utilized by the Board whenever in its discretion it deems it suitable. That can be done speedily, for no judicial review is permissible until after the completion of the election and until a refusal, if any, to bargain with the resulting representative. This remedy and its availability fully effectuate the policies of the Act. If employees are dissatisfied but slumber on their preferences, no policy of the Act requires that they should be able later on to make the

Company pay for their delay. Indeed such a privilege would promote improper dealing, for it would encourage dissatisfied employees to slumber on their feelings not only peacefully but deliberately, availing of the union to obtain all the benefits it could obtain but expecting, should it be held dominated, to receive all their previous dues as a liquidating dividend. To encourage such kind of bargaining would not effectuate the policies of the Act. *N. L. R. B.* v. *Fansteel Metallurgical Corp.* (1939) 306 U. S. 240.

The ready availability and completeness of the remedy of an election fully satisfy the policies of the Act in this regard and make unnecessary the creation of some new remedy by a money award in circumstances like those at bar.

These conclusions are not to be varied by any verbal argument on the part of the Board that compensation for loss need not be limited to the amount of actual loss, because the legislature has fixed a measure of liquidated damages in some cases (e. g., *Overnight Motor Co.* v. *Missel,* 1942, 316 U. S. 572, 583, Fair Labor Standards Act). The legislature may, of course, prescribe any reasonable formula as a conclusive determination of liquidated damages. But in the absence of legislative action, an administrative agency, seeking to compensate for losses, can go no further than the amount of the actual loss (*Republic Steel Corp.* v. *N. L. R. B.,* 1940, 311 U. S. 7). *Acton* v. *B. & O. S. W. R. Co.,* 1915, 59 Ind. App. 280, 108 N. E. 535, "allowing," as the Board says (Brief, p. 43, n. 43), "recovery of the full amount of wages checked off to an illegal relief association without any allowance of credit for the benefits actually paid by the relief association to the employee" did not involve any such question. That was an action to recover the amount of wages checked off for relief association dues; the answer set up the existence of the association and the plain-

tiff's membership; a judgment overruling a demurrer to that answer was reversed, the Appellate Court expressly saying:

> "There is no averment that appellant ever received any benefits from the association." (108 N. E. at 536).

IV.
SUBMISSION

It is therefore respectfully submitted that paragraph (e) of Section 2 of the Board's order (S. R. 61), requiring dues reimbursement, is beyond the power of the Board and accordingly invalid and that the decree below (S. R. 78), so far as enforcing that requirement, should be reversed.

Respectfully submitted,

T. JUSTIN MOORE,
GEORGE D. GIBSON,
Attorneys for the Company

Dated May 4, 1943.

HUNTON, WILLIAMS, ANDERSON,
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Of Counsel.

APPENDIX

The Check-Off Clause

[I. O. E. AGREEMENT OF AUGUST 5, 1937, R. 828]

"The Employer agrees to accept a written order signed by any member of the Employee Organization authorizing the Employer to deduct from that member's wages the amount therein specified and to pay to the Employee Organization said amount less the Employer's cost of making such deduction. Any such order may be revoked at any time by notice in writing given by the employee of the Employer."

The Closed Shop Clause

[I. O. E. AGREEMENT OF AUGUST 5, 1937, R. 827-8]

"During the term of this agreement, the Employer hereby agrees not to retain in its employment for a period of more than ninety days after the date of this agreement any employee eligible for membership in the Employee Organization, unless such employee is a member of the Employee Organization. The Employee Organization agrees to furnish to the Employer within five days after the signing of this agreement a complete list of all members of the Employee Organization and thereafter to keep said membership roll so furnished to the Employer currently up to date.

"Nothing contained in this agreement shall prevent or in any wise affect the right of any employee to join or remain a member of any other labor organization."

I. O. E. By-Law as to Dues

"ARTICLE II.—DUES

"Each member of the Organization shall pay dues to the Organization in the sum of Three Dollars ($3.00) per year, payable semiannually in July and January in advance. Each member shall direct the proper disbursing officer of the Company to deduct the amount of such member's dues from his wages, and pay the same, less the employer's cost of making such deduction to the Treasurer of the Organization . . ." (R. 855.)

I. O. E. By-Law as to Amendments

"ARTICLE III.—AMENDMENTS

"Any provision of these by-laws may be amended, altered, or repealed by a two-thirds vote of all of the members of the General Committee of the Organization at two consecutive regular meetings of the Committee." (R. 855.)

I. O. E. Membership Card

[R. 843]

I HEREBY APPLY FOR MEMBERSHIP IN THE INDEPENDENT ORGANIZATION OF EMPLOYEES OF VIRGINIA ELECTRIC & POWER COMPANY

and I hereby expressly bind myself to abide by the constitution and bylaws of that organization. I hereby empower that organization and the General Committee of the organization, as the supreme body of the organization, to act as my bargaining agency to negotiate with the management of the Virginia Electric & Power Company on matters relating to wages, hours of work, safety, sanitation, working conditions, and all other matters involving the relationship of Virginia Electric & Power Company with its employees.

Given under my hand this ..... day of .....

.....

(Sign name here)

To Virginia Electric & Power Company:

The Virginia Electric & Power Company will please pay to the Treasurer of the Independent Organization of Employees of Virginia Electric & Power Company *$3.00 per year, in semi-annual installments, in advance, less the cost of making such deductions* and deduct the said sum of $3.00 from my salary, until this assignment is revoked in writing by me.

no dollars

Dated:.....

.....

(Sign name here)

Notice of the above assignment is hereby acknowledged, and the above amounts will be paid, as directed.

VIRGINIA ELECTRIC & POWER COMPANY

By

.....

Dated:.....